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No. 91-1260

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

LAC D'AMIANTE DU QUEBEC, LTEE,

Petitioner,

v.

STANLEY STANEK and ROBERT LINDHOLM,

Respondents.

Petition For Writ Of Certiorari
To The District Court Of Appeals
Of The State Of Minnesota, Fourth District

REPLY BRIEF

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ARGUMENT

Respondents' brief in opposition to Lac d'Amiante du Quebec, Ltee's ("LAQ") Petition for a Writ of Certiorari purports to state two reasons for denying LAQ's Petition: (1) the case does not present a pure stream of commerce situation; thus, the Minnesota Court of Appeals decision is in agreement with *Asahi*; and (2) the Minnesota court did not confuse the separate doctrines of specific and general jurisdiction. Both grounds asserted by respondents, however, rely entirely on a factual argument which has never been raised or addressed below – that LAQ's historical, direct contacts with the forum are somehow connected to the present matters. (Respondents' Brief in Opposition at 1-2, hereinafter "RB"). That argument is not only improper, inasmuch as it is not part of the record below, it is also completely without merit.

I. RESPONDENTS' ARGUMENT MUST FAIL BECAUSE IT WAS NEITHER RAISED NOR CONSIDERED BELOW.

Respondents claim that LAQ's limited shipments to a Ruberoid plant in Minnesota are related to the present causes of action. (RB at 1). Respondents raise this argument for the first time in their brief in opposition to LAQ's Petition for Certiorari Review. Although respondents intimate that the Court of Appeals of Minnesota adopted this view in its opinion, (RB at 4), the fact remains that neither the Minnesota Court of Appeals, nor the Minnesota District Court, determined that LAQ's Ruberoid shipments were in any way connected to the present actions.

Nowhere in respondents' brief do they cite to a single place in the record where their nascent argument is even addressed by the Minnesota courts. Instead, respondents imply that the issue was addressed by pointing out that LAQ's historical "*direct* contacts were certainly referenced by the Court of Appeals . . . " (RB at 4). Indeed, respondents emphatically argue throughout their brief that the appellate court found that LAQ "*had both direct contacts and indirect contacts*" with the forum (RB at 3), as if repeating and italicizing the point will somehow demonstrate a nexus between the direct contacts and respondents' claims.

Contrary to respondents' argument, however, the appellate court did not determine that LAQ's minimal past shipments to the Ruberoid plant were in any way connected to the present actions. Rather, it is clear from the language of the Court of Appeals' decision that the court and the parties assumed, properly, that respondents' alleged injuries did *not* arise out of or relate to LAQ's direct contacts with the forum. The entire focus of the court's jurisdictional analysis was that "[p]urposeful availment may be established, like quantity of contacts, through a stream-of-commerce theory." *Stanek v. A.P.I., Inc.*, 474 N.W.2d 829, 834 (Minn. Ct. App. 1991), *review denied*, C8-91-493, CX-91-518 (Minn. Oct. 31, 1991).

This Court has consistently held that an argument which has not been presented or considered by the lower courts in deciding an issue should not be considered on review. *See, e.g., Air Courier Conf. v. Postal Workers*, ___ U.S. ___, 112 L.Ed.2d 1125, 1135 (1991); *Hallie v. Eau Claire*, 471 U.S. 34, 42 n.5 (1985). Accordingly, respondents' argument that LAQ's direct contacts are related to

the present actions should not be considered by this Court in its determination of whether to grant certiorari review.

II. RESPONDENTS' CLAIM THAT THERE IS A NEXUS BETWEEN LAQ'S LIMITED DIRECT CONTACTS WITH THE FORUM AND THE PRESENT MATTERS IS COMPLETELY LACKING IN MERIT.

In addition to the fact that respondents' argument was not raised below, there is absolutely no evidence to support the contention that a link exists between respondents' alleged injuries and LAQ's Ruberoid shipments, either in the record below or in respondents' submission to this Court. In fact, it would have been impossible for the Minnesota Court of Appeals to reach the conclusion suggested by respondents inasmuch as the only evidence presented to the court on this issue showed that "Ruberoid used [LAQ's] fiber to manufacture asphalt-based roof materials in which the asbestos fibers were encapsulated and non-respirable." (Pet. App. at 84). Thus, unless respondents had been employed at Ruberoid and had worked in the manufacture of the roof materials, they could not have been exposed to the fiber sold to the Ruberoid plant.[1] As noted by LAQ in its petition,

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[1] Because the fiber was encapsulated and non-respirable, respondents could not have been injured by exposure to the end product roofing material. Moreover, no plaintiff has alleged exposure to asphalt-based roof materials during the time that LAQ supplied fiber to the Minnesota Ruberoid plant. In fact, only one plaintiff has claimed any exposure to roof

(Continued on following page)

respondents do not allege to have worked at the Ruberoid plant; nor do they assert that they have been exposed to raw asbestos fiber.

Respondents' reference to the fact that GAF Corporation is a defendant in these matters as a successor-in-interest to Ruberoid is of no moment. That point would have significance only if respondents had shown, and the appellate court had determined, that LAQ's limited shipments to Ruberoid were somehow related to respondents' actions. As demonstrated above, however, the appellate court never made such a determination and, moreover, no evidence of such a nexus exists.

III. RESPONDENTS HAVE FAILED TO REFUTE THE REASONS SET FORTH IN LAQ'S PETITION FOR THE GRANT OF CERTIORARI REVIEW.

Respondents' brief relies solely on the argument that LAQ's direct contacts with the forum are related to their claims. In the absence of that argument, the points raised in respondents' opposition collapse. Accordingly, respondents have failed to refute any of the reasons articulated in LAQ's Petition for the grant of certiorari review.

To begin with, respondents assert that the Minnesota Court of Appeals' decision is "analytically consistent"

(Continued from previous page)

materials, and that alleged exposure occurred during the time period from 1947 to the early 1950's. (*See* highlighted portions of the deposition of respondent McGregor, annexed hereto as Exh. AA, App. 1). LAQ's first shipment of fiber to the Ruberoid plant did not occur until 1959.

with *Asahi Metal Indus. v. Superior Court of California*, 480 U.S. 102 (1987). (RB at 9-10). Respondents' attempt to demonstrate harmony between the Court of Appeals' decision and *Asahi*, however, hinges on their argument that there is a link between LAQ's direct contacts with the forum and their actions. Thus, respondents argue that LAQ's prior contacts constitute the "something more" required by the *Asahi* plurality opinion. (RB at 8-9).

Absent a nexus between the forum-related contact and the cause of action, however, the "something more" requirement of *Asahi* cannot be satisfied by LAQ's minimal past contacts. Those contacts are only relevant to a general jurisdiction analysis and may not be considered in a determination of long-arm jurisdiction. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984).

The Minnesota Court of Appeals' decision was clearly an analysis of whether the forum could properly assert long-arm personal jurisdiction over LAQ. *Stanek*, 474 N.W.2d at 832. The appellate court never concluded that it could assert general jurisdiction over LAQ. Moreover, the Court of Appeals specifically articulated a stream-of-commerce theory which would permit the assertion of jurisdiction over a nonresident based on mere awareness that its product might reach the forum through the stream-of-commerce, in direct conflict with the *Asahi* plurality decision. *Id.* at 833-34.

Respondents do not dispute in their opposition that it would be improper for a court to rely on contacts which are unrelated to a cause of action in connection with a long-arm jurisdiction analysis. Instead, they attempt to

create a nexus between LAQ's past contacts with the forum and their own causes of action. As discussed above, that attempt must fail and, accordingly, respondents' efforts to harmonize the Court of Appeals' decision and *Asahi* must also fail.

Respondents' only other argument is that the Minnesota Court of Appeals did not ignore the distinction between "specific" and "general" jurisdiction. That argument similarly crumbles with the destruction of the underlying attempt to demonstrate a connection between the forum-related activity and respondents' causes of action.

This Court has repeatedly observed that a forum may invoke specific jurisdiction only when plaintiff's claim "arises out of or relates to" defendant's contacts with the forum. *E.g., Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984). The Court of Appeals did not determine that respondents' claims arose out of or related to LAQ's limited shipments of fiber to the Minnesota Ruberoid plant. The only contact cited by the Court of Appeals which is relevant to a specific jurisdiction analysis was LAQ's "sales to large American distributors" which it held "suggest[ed] contacts sufficient in nature and quality so that a reasonable inference may be drawn from the character of the business." 474 N.W.2d at 834-35. Respondents' intimation that other contacts could have properly entered into analysis is improper and lacks any evidential support.

Distilled to its essence, respondents' opposition is nothing more than a desperate attempt to muddy, rather than address, the clear legal issues set forth in LAQ's

petition by improperly raising incipient and meritless factual issues. Despite respondents' unsupported and untimely argument, however, the reasons for granting LAQ's petition remain clear – this case presents a clear opportunity for this Court to define the "purposeful availment" element of a personal jurisdiction analysis in a stream-of-commerce situation.

CONCLUSION

For the foregoing reasons, and those set forth in LAQ's Petition, LAQ respectfully prays that this Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: March 26, 1992

EXHIBIT AA

STATE OF MINNESOTA	IN DISTRICT COURT
COUNTY OF KOOCHICHING	NINTH JUDICIAL DISTRICT

Wilfred McGregor,
Plaintiff,

vs.

American Brake and Block, a Delaware Corp.,

American Crane National, a Minnesota Corp.,

Anchor Packing Co., a Delaware Corp.,

Asbestos Corp. Ltd., a Canadian Corp.,

Asbestos Product Manufacturing Corp.,

Asbestospray Corporation, Individually and as Successor in Interest to Asbestos Product Manufacturing Corp., a New York Corp.,

Atlas Turner, Inc., a Canadian Corp.,

Bell Asbestos Mines, Ltd., a Canadian Corp.,

A. H. Bennett Company, a Minnesota Corp.,

Calaveras Asbestos, Co.,
a California Corp.,

Carey Canada, Inc.,
a Canadian Corp.,

Cassiar Asbestos Corp., Ltd.,
a Canadian Corp.,

The Celotex Corp.,
a Delaware Corp.,

A. W. Chesterton Company,
a Massachusetts Corp.,

Chicago Fire Brick Co.,
a Delaware Corp.,

Combustion Engineering, Inc.,
a Delaware Corp.,

John Crane, Inc.,
a Delaware Corp.,

Crown Cork & Seal Co., Inc.,
a Delaware Corp.,

Crown Iron Works,
a Delaware Corp.,

M. H. Detrick Company,
a Delaware Corp.,

Eagle-Picher Industries, Inc.,
an Ohio Corp.,

Empire-Ace Insulation Mfg. Corp.,
a New York Corp.,

Fibreboard Corporation,
a Delaware Corp.,

Flexitallic Gasket Co., Inc.,
a Connecticut Corp.,

Flintkote Company,
a Connecticut Corp.,

GAF Corporation,
a Delaware Corp.,

Garlock, Inc.,
a New York Corp.,

W. R. Grace,
a New York Corp.,

The Jamar Company,
a Minnesota Corp.,

Kaiser Aluminum &
Chemical Corp.,
a Delaware Corp.,

Keene Corp.,
a Delaware Corp.,

Lake Asbestos of Quebec, Ltd.,
a Delaware Corp.,

MacArthur Co.,
a Minnesota Corp.,

Mobile Oil Corp.,
a New York Corp.,

National Gypsum Co.,
a Delaware Corp.,

Owens-Corning Fiberglas Corp.,
a Delaware Corp.,

Owens-Illinois, Inc.,
an Ohio Corp.,

Pittsburgh Corning Corporation,
a Pennsylvania Corp.,

H. K. Porter Co., Inc.,
a Delaware Corp.,

H. H. Robertson Company,
a Pennsylvania Corp.,

Stebbins Engineering and
Manufacturing Co.,
a New York Corp.,

Turner Asbestos Fibres, Ltd.,

Turner & Newall; PLC,

Union Carbide Corp.,
a New York Corp.,

United States Gypsum Co.,
a Delaware Corp.,

Defendants.

[p. 4] DEPOSITION of WILFRED McGREGOR, taken on the 23rd day of October, 1990, commencing at approximately 9:00 a.m., at the Holiday Inn, Highway 11 East, International Falls, Minnesota 56649, before Pamela A. Cook, a Notary Public in and for the County of Sherburne, State of Minnesota, taken pursuant to Notice.

* * *

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* * *

[p. 31] sometimes take it off the kilns.

Q Okay. You talk about loading it. You're talking once the product is finished being made?

A Yes.

Q You're taking it off the process and putting it in some kind of cars or something?

A Yes, box cars.

Q Do you believe you had any exposure to any kind of asbestos products doing that?

A Well, there was asbestos pipes around and the Insulite kilns but there was a lot of –

Q Did you work in the kilns at all?

A I've worked on top.

Q Doing what?

A Repair them.

Q Repairing the kilns?

A With a bricklayer.

Q With a what, sir?

A A bricklayer.

Q Okay. This is not back in 1946 though?

A No.

Q In 1946 did you do any work on the kilns?

A No.

Q Did you do any work with any kind of insulation product in 1946?

[p. 32] A No.

Q Then after you were done working for Insulite, what was your next job for Mando?

A In the yard.

Q And what did you do in the yard crew?

A Well, I did different jobs. And when somebody needed, you know, another man, why they'd call us.

Q Would the yard crew generally be what I would call general labor?

A Well, yeah, but a labor pool.

Q A labor pool?

A Yeah.

Q And where they had a need in the plant is where you would be sent?

A Yes.

Q How long did you remain a part of the yard crew?

A About three, four years.

Q And then what was the next job?

A Mason helper.

Q And then you became a mason?

A Helper.

Q Didn't you eventually become a mason?

A No.

Q You remained a bricklayer helper until you retired?

A Yes.

[p. 33] Q And you started a bricklayer helper in what year, approximately?

A Early '50s.

Q Let me talk about the time from when you started as a laborer with the yard crew up until when you started as a mason helper. I want to deal with while you were working on the yard crew. Okay? While you were doing that, did you ever at any time actually put insulation on anything?

A Well, I worked with bricklayers before I got on steady, when they needed it.

Q Other than working with the bricklayers, would you work with any asbestos products?

A No.

Q The only time you would have exposure to asbestos insulation products that you know of would be when you would work either with the bricklayers or as a mason helper, correct?

A Before I got on steady.

Q Right, but you still worked with the bricklayers?

A Yes.

Q But in no other jobs that you did in the yard crew do you believe you had exposure to asbestos?

A No.

Q When you actually became a mason's helper, would that be a job change so that you would get a salary increase?

* * *

[p. 64] bit.

BY MR. PARRINGTON:

Q With that in mind, sir, is there anything that you testified to so far this morning that you want to add some information to or explain?

A Well, I – now, do you want to know all of the work all over in the mill?

Q I'd like to try to know most of the places, yeah. Why don't you tell me where else?

A Oh, we worked all over. We would be patching different things all throughout the mill, you know, little jobs.

Q But where? What kinds of things would you be doing? Where would you be patching brick?

A Repairing the walls.

Q Would you think that would be an asbestos product?

A No.

Q Let's limit to where you would be using a product that you thought may have asbestos. Anywhere else that we haven't talked about where you might have worked in the mill using something what might have contained asbestos?

A Might have been up on one of the boilers tore off the –

Q Doing what?

A Repairing the roof, the outside of the roof.

Q What kind of material was that roof made out of?

A It seems like – not gypsum, you know, but –

[p. 65] Q What did it look like?

A Brown. It was just like – what is that? It was some insulation, I know.

Q Would you be working on the outside of the roof?

A Yes.

Q Was it a pebble and pitch roof?

A No.

Q Was it a rubber roof?

A No.

Q What was it like? You're up there walking on it. Tell me what it looks like?

A It was covered with something else but it seemed like we pulled off some insulation, whatever it was.

Q Was it covered with something that looked like a vinyl or something?

A No.

Q Okay. What did the material that it was covered with look like? Was it smooth, rough?

A It was smooth, you know. Not – it wasn't paint or anything, vinyl.

Q Was it like an asphalt?

A No.

Q What color?

A It seems like it was light.

Q And then below that was it something that was sticky if

* * *

[p. 105] Garlock, Inc. and Lake Asbestos of Quebec. Did you ever work with any gaskets?

A Well, the digesters, they used gaskets.

Q Did you ever change any gaskets?

A I was there when they – no, I never did.

Q Did you ever pack any pumps?

A No.

Q You talked about working on a roof. Did you ever do any roofing work other than the one that you described for Mr. Parrington?

A When I was in the yard, I did. I was on the roofing crew for a while.

Q Did you work with asphalt shingles?

A Yes.

Q Do you know who manufactured those asphalt shingles?

A No.

* * *